

**NOV 21 2005**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RENE MARTINEZ,

Defendant - Appellant.

No. 04-50249

D.C. No. CR-03-00913-R-03

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Central District of California  
Manuel L. Real, District Judge, Presiding

Submitted November 8, 2005<sup>\*\*</sup>

Before: WALLACE, LEAVY, and BERZON, Circuit Judges.

Rene Martinez appeals the 46-month sentence imposed after his guilty-plea conviction to possession with the intent to distribute a controlled substance in

---

<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(B). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we remand.

We conclude that Martinez did not waive his right to appeal his sentence. Martinez's plea agreement provided an exception to his general waiver of appeal rights based on an unconstitutional sentence, and the contention that Martinez raised regarding the sentencing adjustment falls within that exception.

We remand the sentence for further proceedings consistent with *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc).

We note that there appears to be a clerical error in the Judgment and Commitment because it refers to "marijuana," even though there is no mention of marijuana in Count 2 of the Indictment, the only count to which he pled, or in the plea agreement.

**REMANDED.**